HONG LEONG FINANCE BHD

v.

TRAVERS DEVELOPMENT SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[ORIGINATING SUMMONS NO: S2-24-1546-2000]
18 OCTOBER 2000

LAND LAW: *Sale of land - Auction - National Land Code, s. 256 - Whether defendant shown "cause to the contrary" - Whether service of notice proper - Agreed address of service - No notification of change of address - Failure to allege specific breach - Plaintiff's computerised statement of account challenged*

CIVIL PROCEDURE: *Service - Companies - Change of registered address - No notification of change - Whether service of notice of demand proper*

Pursuant to s. 256 National Land Code, the plaintiff filed an application for sale by public auction six properties belonging to the defendant. The properties were charged to the plaintiff as security for a loan advanced by the plaintiff to the defendant. The defendant challenged the plaintiff's application on the grounds that (i) it did not receive the notice of demand recalling the loan as the notice was not sent to its new registered address; and (ii) the plaintiff failed to allege specific breach in the notice of demand and in the Form 16D notice. The defendant also challenged the accuracy of the plaintiff's computerised statement of accounts. The main issue was whether the defendant had shown caused to the contrary to resist the plaintiff's application.

Held:

[1] The parties had agreed in the contract agreement on the address for service and clearly the onus was upon the defendant to notify the plaintiff of any change of address. However, no evidence was adduced that the defendant did notify the plaintiff of the change of address. Therefore, there had been proper service of both the notice and the statutory notice of demand and the defendant was solely to blame if it now contended that it had not received the notice and the statutory notice.

[2] The notice and the statutory notice were vague as the plaintiff had not clearly shown in those notices the alleged breach that the defendant was to have committed. The defendant therefore had shown "cause to the contrary" under s. 256(3) National Land Code.

[3] The evidence of the statement of accounts from the ledger which was subjected to challenge must be disregarded as the plaintiff failed to comply with s. 90A Evidence Act 1950. Thus in the circumstances, the defendant has yet again shown "cause to the contrary".

[Application dismissed.]

Case(s) referred to:

Bank Utama (Malaysia) Bhd v. Cascade Travel & Tours Sdn Bhd [2000] 4 CLJ 457 ***(foll)***

Southern Finance Company Bhd v. Zamrud Properties Sdn Bhd [1998] MLJ 87 ***(foll)***

Legislation referred to:

Evidence Act 1950, s. 90A(2)

National Land Code (Act 56 of 1965), s. 256(3)

For the plaintiff - SY Ng; M/s Raja, Darryl & Loh

For the defendant - RY Wong; M/s Dennis Nik & Wong

Reported by Izzaty Izzuddin

JUDGMENT

RK Nathan J:

This is the plaintiff's application for sale by public auction of six properties (the said properties) belonging to the defendant and charged to the plaintiff as security for a loan of RM20 million granted by the plaintiff to the defendant at the latter's request. A loan agreement dated 26 August 1996 was executed by the parties containing numerous terms and conditions. The plaintiff contended that the defendant had breached the terms of the agreement and sent to the defendant a notice of demand dated 18 May 1999 and which is reproduced in full. It reads as follows:

Travers Development Sdn Bhd Level 9, Grand Seasons Avenue No. 72 Jalan Pahang 53000 Kuala Lumpur	BY HAND/ REGISTERED & ORDINARY POST
and/or	
lst Floor, Wisma Equity No. 150 Jalan Ampang 50450 Kuala Lumpur	
and/or,	
Lot 7.01, 7th Floor, Wisma Equity Jalan Ampang 50450 Kuala Lumpur	

19th May 1999

Dear Sirs

Re: HONG LEONG FINANCE BERHAD
Term Loan Facility of RM20 million

We act for Hong Leong Finance Berhad of Level 1, Wisma Hong Leong, 18 Jalan Perak, 50450 Kuala Lumpur who has granted you the abovesaid facility.

2. Our client instructs us that despite repeated demands you have failed, refused and/or neglected to pay the arrears of instalments due under the said facility.

3. Our client now wishes to recall the said facility. We are therefore instructed to demand from you which we hereby do the sum of RM22,878,092.83 which sum is due and owing from you as at 15th May 1999, computed as follows:-

Balance outstanding as at 30.4.99	RM22,762,216.44
Interest from 1.5.99 till 15.5.99	RM 114,746.50
Late payment interest from 1.5.99 till 15.5.99	RM1,129.89
	RM22,878,092.83

4. TAKE NOTICE that should we fail to receive the aforesaid sum of **RM22,878,092.83** together with a further sum of RM250.00 being our solicitors' costs herein incurred within seven (7) days hereof, we have our client's instructions to proceed with legal action against you without any further reference to you. In such event, our client holds you liable for all additional interest accrued together with costs and expenses incurred including all legal fees on a solicitor and client basis.

Yours faithfully,

Sgd.

c.c. Guarantor - Chan Teik Huat
Client (Ref: 154-38-00021-6)

When there was no response to the notice of demand the plaintiff's solicitors sent the statutory notice, the form 16D, with an accompanying letter dated 9 May 2000. Both the letter and the form 16D are reproduced as follows:

Travers Development Sdn Bhd BY HAND
Level 9, Grand Seasons Avenue
No. 72 Jalan Pahang
53000 Kuala Lumpur and/or,

Tingkat 1, Wisma Equity
No. 150 Jalan Ampang
50450 Kuala Lumpur and/or,

Level 9, Grand Seasons Avenue
No. 72 Jalan Pahang
53000 Kuala Lumpur and/or,

Lot 7.01, 7th Floor, Wisma Equity
Jalan Ampang
50450 Kuala Lumpur

9th May 2000

Dear Sirs

Re: HONG LEONG FINANCE BERHAD
Charge over lands held under:-

1. **Geran No. 25022 (dahulunya CT No. 7101) Lot No. 2 Sek. 95 Bandar Kuala Lumpur**
2. **CT No. 11006 (Geran No. 29446) Lot No. 48 Sek. 95 Bandar Kuala Lumpur**
3. **CT No. 11007 (Geran No. 29445) Lot No. 49 Sek. 95 Bandar Kuala Lumpur**
4. **CT No. 1 1009 (Geran No. 29444) Lot No. 51 Sek. 95 Bandar Kuala Lumpur**
5. **CT No. 11580 (Geran No. 28871) Lot No. 59 Sek. 95 Bandar Kuala Lumpur**
6. **CT No. 11581 (Geran No. 29443) Lot No. 60 Sek. 95 Bandar Kuala Lumpur**

We act for Hong Leong Finance Berhad of Level 1, Wisma Hong Leong, 18 Jln Perak, 50450 Kuala Lumpur.

2. Pursuant to Section 254 of the National Land Code 1965, we enclose herewith a Notice in Form 16D by way of service on you.

Yours faithfully,

Sgd.

Encl.
c.c. Client (Ref: 154-38-00021-6)

NATIONAL LAND CODE
FORM 16D
(Section 254)

NOTICE OF DEFAULT WITH RESPECT TO A CHARGE

To:

Travers Development Sdn Bhd
Level 10, Grand Seasons Avenue
No. 72 Jalan Pahang
53000 Kuala Lumpur

and/or

Tingkat 1, Wisma Equity
No. 150 Jalan Ampang
50450 Kuala Lumpur

and/or

Level 9, Grand Seasons Avenue
No. 72 Jalan Pahang
53000 Kuala Lumpur

and/or

Lot 7.01, 7th Floor, Wisma Equity
Jalan Ampang
50450 Kuala Lumpur

Chargor under the Charge described in the Schedule below of the land so described.

WHEREAS you have committed a breach of the provisions of this Charge by failing to comply with Section 3.01 of the Annexure to this Charge and the letter of demand dated 18th May 1999 from the solicitors for the Chargee;

AND WHEREAS the breach has continued for a period of at least one (1) month prior to the date of this notice;

WE as Chargee by virtue of the powers conferred by Section 254 of the National Land Code hereby require you within the period of one (1) month from the service of this notice to remedy the breach;

AND TAKE NOTICE that if you fail to remedy the breach within that period we shall apply for an Order of Sale.

Dated this 9th May 2000.

Sgd.

M/s Raja, Darryl & Loh
Advocates & Solicitors
18th Floor, Wisma Sime Darby
Jalan Raja Laut 50350
Kuala Lumpur
for and on behalf of the
Chargee
Hong Leong Finance Berhad

Findings Of The Court

Non Service Of Notice Of Demand

Mr. Wong's first issue was that his client had not received the initial notice of demand dated 18 May 1999. The annexure to the charge being the loan agreement states the defendant's registered office as lst floor, Wisma Equity, No. 150 Jalan Ampang, 50450 Kuala Lumpur (the Ampang address). Under s. 8.22 of the loan agreement relating to service of notices the defendant's address was clearly stated to be the Ampang address. There was also a provision requiring the chargor defendant to notify the plaintiff in writing by A.R. Registered post in the event of a change in address of the chargor, within seven days prior to such change. It would seem from the letter of demand dated 18 May 1999 that the Ampang address was the second address stated therein. The defendant however in its affidavit in reply stated that he had notified the registrar of companies on 26 January 1999 by way of form 44, that its registered office as of 26 January 1999 would be at Level 10, Grand Seasons Avenue, No. 72 Jalan Pahang, 53000 Kuala Lumpur (the Jalan Pahang address).

To my mind, if the parties had not specifically stipulated the address for service of notices pursuant to s. 8.22 of the loan agreement, the change of address of the registered office would have been a material factor in the defendant's favour. But whilst the registered address could be changed, the parties specifically agreed that service of notices ought to be, in the case of the chargor defendant, at the Ampang address and the onus was clearly upon the defendant to notify the plaintiff of the change of address.

The defendant pointed out that the form 16D had been sent to the Jalan Pahang address. Whilst that may be so I note that the form 16D has also been sent to the Ampang address. Since the defendant has not exhibited any letter which it ought to have sent seven days prior to 26 January 1999, to the plaintiff notifying the plaintiff of the change of address, I hold that the defendant is solely to blame if it now contends it had not received

the registered notice and the statutory notice. It is my judgment that there has been proper service of both the notice and the statutory notice of demand (form 16D). In a similar situation I had said in *Southern Finance Company Bhd v. Zamrud Properties Sdn Bhd* [1998] MLJ 87 at p. 3 as follows:

> I am of the view that whilst there may be various clauses in an agreement or a charge that might seem to speak at cross-purposes, however where the parties have shown their inclination to be jointly bound by a particular view, and more so in this case where the parties had, pursuant to clause 14.01, stipulated the correct address for service of both the chargor and chargee it was the clear intention of the parties that those addresses alone and none other should be the proper addresses for service.

Failure To Allege Specific Breach

The notice of demand dated 18 May 1999 states that the defendant had "failed, refused and/or neglected to pay the arrears of instalments due under the said facility". No details of the arrears of instalments nor the rate of interest used for the calculation had been stated. However, the statutory notice of demand states that the defendant had "committed a breach of the provision of ... s. 3.01" of the annexure to the charge and the said form 16D also refers to the incomplete notice of demand dated 18 May 1999. It is therefore necessary for me to reproduce s. 3.01 of the annexure which reads as follows:

> SECTION 3.01 PAYMENT ON DEMAND
>
> (1) The Chargor will pay and satisfy the Lender on demand:-
>
> (a) in full all moneys which are owing and payable by the Chargor to the Lender under the Loan and pursuant to the Loan Agreement or such amount thereof as may be outstanding under the Loan Agreement including all the interest, costs and charges described thereunder and hereunder (hereinafter collectively referred to as "the Indebtedness");
>
> (b) the charges above-referred to include all bank charges, commission, all expenses which the Lender may in the course of its business charge to the Chargor and all cost, charges, disbursement, legal fees on a full indemnity basis which the Lender may incur in enforcing or seeking to obtain payment of all or any part of the sums owing to the Lender by the Chargor in respect of the Loan and to make good any default by the Chargor or its successors-in-title in payment of the said commission, interest charges or any part thereof and all other charges and disbursements in the preparation stamping or creating of this Charge and in the enforcement of the same against the Chargor;

(c) the interest payable above-referred shall include interest on outstanding sum calculated at the rate prescribed in the Loan Agreement or at such other rate as may be determined or varied by the Lender from time to time including additional interest on late payment and capitalised interest.

(2) The rights of the Lender to capitalise and charge interest as provided herein shall subsist and continue to subsist notwithstanding the issue and/or service of a demand for payment of any moneys intended to be hereby secured and shall be applicable both before and after judgment and notwithstanding that the relationship of financier and customer between the Lender and the Chargor shall have ceased for any reason or cause whatsoever.

(3) For the purpose of this Charge herein a demand for the payment of the moneys due hereunder shall be deemed to be made when the Lender gives to the Chargor a notice in writting in accordance with Clause 8.22 hereof.

Now s. 3.01 is in general terms. Neither the notice nor the form 16D has worked out the specifics. I am satisfied that the plaintiff has not clearly shown the breach that the defendant is deemed to have committed. In this respect the notice and the form 16D are vague and it is my judgment that the defendant has indeed shown "cause to the contrary" under s. 256(3) of the National Land Code.

Statement Of Accounts From Ledger

In support of its case, and to show details of the accounts, the plaintiff produced and exhibited to an affidavit, an extract from the computerised accounts. The defendant had challenged the accuracy of these computerised accounts in various affidavits on three specific occasions. Yet the plaintiff did not see the need to comply with s. 90A of the Evidence Act 1950. In *Bank Utama (Malaysia) Bhd v. Cascade Travel & Tours Sdn Bhd* [2000] 4 CLJ 457, I had on 22 Jun 2000 held that the need to comply with s. 90A(2) of the Evidence Act 1950 must prevail over the Bankers' Books (Evidence) Act 1949 (the BBEA) since the plaintiff had failed to produce a certificate under s. 90A(2) of the Evidence Act 1950. I had said in that case at pp. 7-8 of the judgment as follows:

> Whilst section 2 no doubt says that the Act does not apply to affidavits and by virtue of the decision in *Gomez v. Gomez* it ought also not to apply to exhibits annexed to the affidavits, acceptance of the plaintiff's argument gives a too simplistic approach to the challenge raised by the defence. Whilst the Act does not apply to affidavits it does not mean that an affidavit by a living person can be admitted as evidence *proprio vigore* without the necessity of him taking the witness stand. In order for such evidence to be

admissible it should be capable of being regarded as a statement falling under section 32 (cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant) or under section 73A (admissibility of documentary evidence in civil cases, etc.) of the Act. Once a challenge is taken to the affidavit or to the exhibit annexed to it, then it must be properly proved. Therefore it is my judgment that section 2 does not assist the plaintiff in this case and the said documents must be properly proved pursuant to section 90A of the Act.

Coincidentally the solicitors for the plaintiff herein were the same solicitors for the plaintiff in *Bank Utama*. I shall adopt the same reasoning herein and hold that the evidence of the statement of accounts from the ledger subjected to challenge must be disregarded and in the circumstances I must hold that the defendant has yet again shown a "cause to the contrary".

I therefore have no hesitation in dismissing this application with costs.